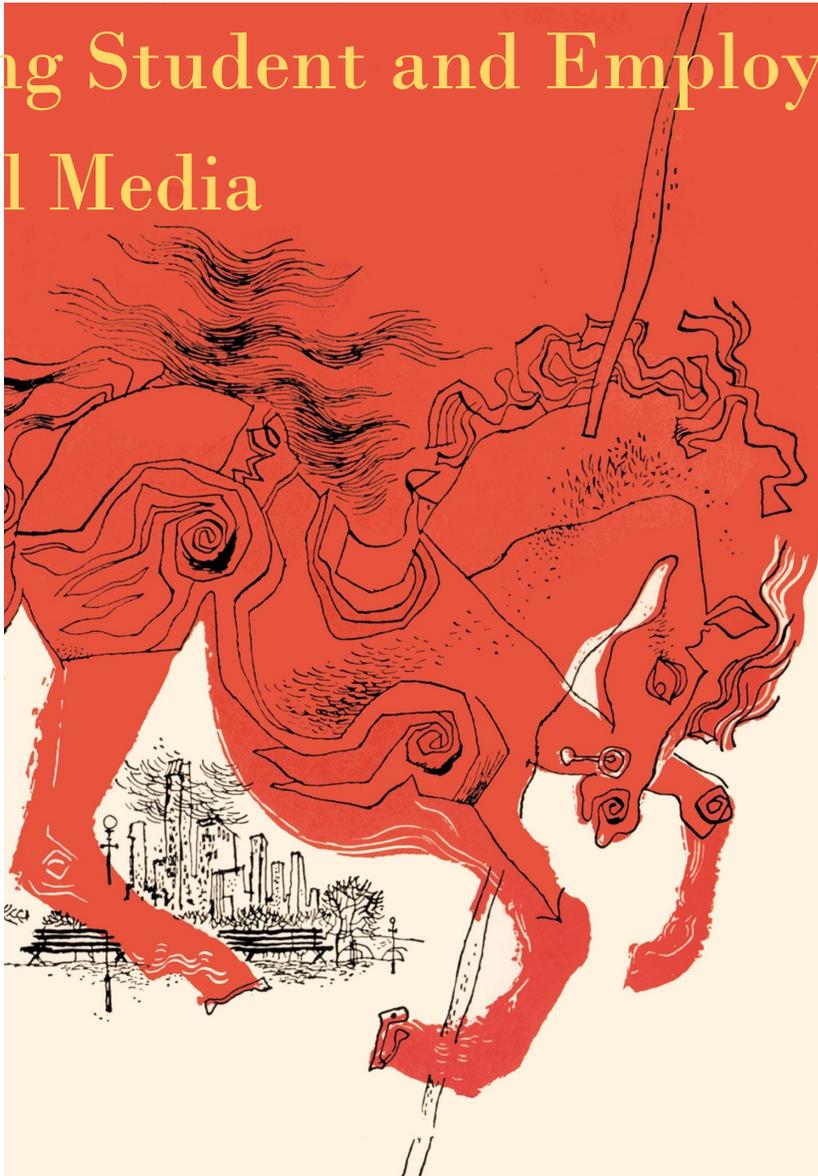


# the CATFISH

## in the RYE

### Managing Student and Employee Use of Social Media



**Hollis R. Peterson, Esq.**

PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP

**Corrie J. Klekowski, Esq.**

PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP

**Trisha Vais**

TRIVIUM CHARTER SCHOOL

24TH ANNUAL CALIFORNIA CHARTER SCHOOLS CONFERENCE • MARCH 23, 2017

## YOUR CHARTER SCHOOL TEAM



**HOLLIS R. PETERSON**  
Partner



**CORRIE J. KLEKOWSKI**  
Associate



**DANIELLE M. BLACKHALL**  
Associate

**H**OLLIS PETERSON represents employers, schools, and health care organizations in all aspects of labor and employment litigation, including the defense of employment wage and hour class actions, wrongful termination, harassment, discrimination, retaliation, failure to accommodate, hostile work environment, due process complaints, collective bargaining, fraud and wage suppression, and Labor Code violations. She handles litigation and administrative hearings relating to Title VII, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family and Medical Leave Act, Older Workers Benefit Protection Act, California Family Rights Act, Fair Employment and Housing Act, and Worker Adjustment and Retraining Notification Act.

In addition to litigation, Hollis represents schools in collective bargaining and union arbitrations involving all aspects of contract administration and enforcement, including unfair labor practice and grievance proceedings, union representation campaigns, union corporate campaigns, labor arbitrations, and labor-management relations. She further provides a broad range of counseling services, including providing employee training, reviewing employee handbooks and employment-related policies, overseeing employee discipline, and conducting investigations.

Prior to attending law school, Hollis enjoyed careers as a teacher and school counselor in multiple districts across the country and for the Department of Defense. With more than a decade of experience as an educator, Hollis is uniquely qualified to represent school clients in special education, test administration, and personnel matters. She represents multiple schools across California in defense of due process complaints for failure to provide Free Appropriate Public Education.

**C**ORRIE KLEKOWSKI is a passionate and creative employment and education litigator. She specializes in dispositive motion work by eliminating claims against her clients early in litigation. Corrie represents schools and other employers through all litigation stages and has particular experience representing public entities, non-profits, and educational institutions. Corrie defends schools in a wide variety of matters brought by students, parents, staff, and the public. She enjoys finding solutions in challenging and unique legal predicaments. Corrie also loves helping her clients by providing advice and counseling on student issues and employment challenges, including employee discipline, terminations, and leaves of absence.

Corrie's great sense of humor and animated story telling make her an engaging public speaker. She regularly trains supervisors and human resource professionals on a wide spectrum of employment issues including leave laws, investigations, and best management practices.

**D**ANIELLE BLACKHALL has significant experience representing private and public employers, including school districts and California-based charter schools, in administrative proceedings and all aspects of labor and employment litigation in California state and federal courts. As a litigator, Danielle aggressively defends her clients against all types of employment claims, including wrongful termination, harassment, discrimination, defamation, retaliation, and compliance with the Americans with Disability Act (ADA), often securing dismissal for her clients at the pleadings stage. In addition, Danielle dedicates a significant portion of her practice to defending and advising educational clients on topics unique to the educational setting, such as governmental immunities, administrative exhaustion, special education obligations, denial of Free Appropriate Public Education (FAPE), personnel matters and due process complaints from hearing through appeal.

Danielle also enjoys partnering with employers to provide training on a variety of topics, including sexual harassment prevention, LGBTQ inclusion, anti-discrimination, anti-bullying, workplace investigations, accommodating disabled workers, family and medical leave issues, and counseling her clients on day-to-day issues such as, policy creation/revision, handbook reviews, employee performance, discipline and termination, accommodations, background checks, contract disputes, student discipline, Individualized Education Plans (IEP), internal grievances and due process complaints.

## TODAY'S OBJECTIVES

- Define Social Media
- Identify Legal Pitfalls
- Privacy Issues
- Harassment/Discrimination
- Content Activity
- First Amendment – Free Speech
- Confidential Information
- Establishing Boundaries With Students and Parents
- Policy Analysis

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## WHAT IS SOCIAL MEDIA?

Facebook, LinkedIn, Yammer, WhatsApp, YouTube, Websites, YikYak, Blogs, Message Boards, Kik, Instagram, Vine, Pinterest, Snapchat, Electronic Communications, Tumblr, Google Plus, Tinder

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## SOCIAL MEDIA

- Status Updates
- Sharing Photographs
- Links to articles, websites
- Games, gifts, shopping
- Keeping Contact With Friends, Relatives
- Posting Videos
- Tagging, Sharing or Liking/Disliking

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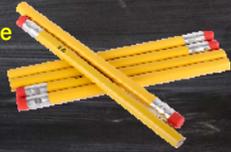
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## WHY CHARTER SCHOOLS NEED SOCIAL MEDIA

- Advertising/Branding
- Increased Visibility
- Communication With Students, Families, and Community
- Improving Employee Morale
- To Stay Relevant



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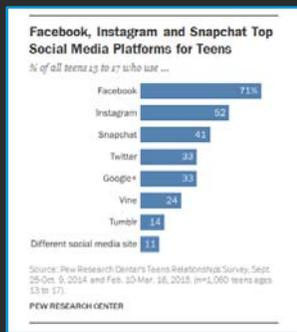
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## YOUR STUDENTS ARE USING IT...



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## WHY SCHOOLS NEED TO BE CAUTIOUS ABOUT SOCIAL MEDIA

(AND HAVE STUDENT/STAFF POLICIES):

- Ownership of the Site
- Harassment/Discrimination
- Breach of Confidentiality
- Safety issues
- First Amendment Protections
- Concerted Activity
- Distraction from Learning



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**EMPLOYEES & LABOR CODE 96(K) AND 98.6**

- Prohibits adverse employment action for lawful conduct outside of work
- It does not, however, provide employees with substantive rights

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**NLRA - SECTION 7**

- The NLRA applies to both union and non-union employees
- Employees can discuss (i.e., complain about) their wages, hours, and working conditions on social media, including complaints about supervisors, if it is "concerted activity," or, more than one person participates.
- Social Media policies regarding off-work conduct cannot infringe upon or discourage Section 7 rights.

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**PRIVACY: REASONABLE EXPECTATION**

- California constitutional right
- What is protected?
  - A reasonable expectation of privacy in the circumstances
- Policies can reduce the expectation

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## BEFORE DISCIPLINING EMPLOYEES FOR SOCIAL MEDIA USE...

### CONSIDER:

- The National Labor Relations Act
- Whistleblower Statutes
- Legal off-duty Activities
- Discrimination/Retaliation Claims

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## PRIVACY: LABOR CODE SECTION 980

Employers are not entitled to employee or applicant email or social media passwords

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## EMPLOYERS CAN OBTAIN PERSONAL SOCIAL MEDIA INFORMATION IF:

(1) the information is reasonably believed to be relevant to an **investigation** of an allegation of an employee's misconduct or violation of applicable laws or regulations; and

(2) if the information is used solely for the purpose of the investigation and related proceeding

- California Labor Code section 980 still allows an employer to request the username, password, or access code of electronic devices or accounts that belong to the employee

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## CONFIDENTIAL INFORMATION

### HIPAA

No Information About Protected Leaves!  
No Employee Health Information At All!

### FERPA

No identifying information about students.  
No photos without parent and school permission.  
Recommend No Comments.

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## BOUNDARIES WITH STUDENTS AND PARENTS

### DO NOT CROSS

- Friending on School Sites
- Friending on Private Sites
- Sharing posts, links, jokes, blogs or photos
- Student access to Employee's equipment

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## STAFF DISCIPLINE

- Balancing test between interests of the staff member, as a citizen, in commenting upon matters of **public concern** and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).
- If acting as a private citizen discussing a matter of **private concern**, discipline is permitted; if **public concern**, can discipline if the speech is **disruptive** to the school.
- Discipline will be upheld if the school reasonably believes speech would **significantly impair employee's ability to perform the employee's duties**, disrupt the school, undermine supervisory authority or destroy close working relationships.

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## HARASSMENT AND DISCRIMINATION

- FEHA and Title VII prohibit discrimination or harassment based upon age, gender, religion, race, national origin, disability, sexual orientation, gender identity, etc.



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### IS FACEBOOK PART OF THE WORKPLACE?



Chick-fil-A  
Fast Food Restaurant

Timeline About Photos Chick-fil-A Locator More

PEOPLE > Post Photo/Video

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### My Blog

- HOME
- ABOUT

*Monday*  
*Things I wish I could say on report cards:*

**“Seems smarter than she actually is.”**

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**My Blog**

- HOME
- ABOUT

*Monday*

*Things I wish I could say on report cards:*

**“Shy isn’t cute in 11<sup>th</sup> grade.  
It’s annoying.”**

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**My Blog**

- HOME
- ABOUT

*Monday*

*Things I wish I could say on report cards:*

**“Dresses like a Street  
Walker.”**

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**My Blog**

- HOME
- ABOUT

*Monday*

*Things I wish I could say on report cards:*

**“There is no other way  
to say this: I hate your  
kid.”**

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## 1<sup>ST</sup> AMENDMENT AND REGULATING STUDENT SPEECH

- Student speech may not be obscene, libelous, or slanderous, harassing, discriminatory, a "true threat," or an act of bullying.
- Speech can be regulated if it is *reasonably foreseeable that a material disruption will occur or is likely to occur*
- More likely to be restricted if on campus and/or during school hours
- Less likely to be restricted if off school property and during non-school hours



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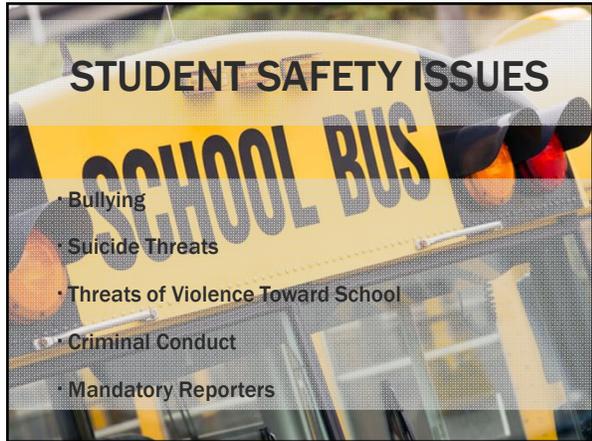
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## STUDENT SAFETY ISSUES

- Bullying
- Suicide Threats
- Threats of Violence Toward School
- Criminal Conduct
- Mandatory Reporters



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## STUDENTS' HARASSMENT OF OTHER STUDENTS

- *J.C. ex rel R.C. v. Beverly Hills Unified School District*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010)
- Student created a YouTube video during non-school hours off school property using her personal cell phone
- The video was accessible from school computers
- The video ranted about another student

PROTECTED SPEECH OR NOT?



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## STUDENTS' HARASSMENT OF OTHER STUDENTS (CONTINUED)

- *LaVine v. Blaine School District*, 279 F.3d 719 (9th Cir. 2002)
- A student wrote a poem off campus about how it felt to kill classmates
- She asked a teacher to review it, who became alarmed
- Emergency suspension

• **PROTECTED SPEECH OR NOT?**

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## STUDENTS' HARASSMENT OF TEACHERS

- *Snyder v. Blue Mountain School District*, 650 F.3d 115 (3rd Cir. 2021)
- Using her home computer, student created a fake Myspace page profile of the principal that could not be accessed from school computers
- General Interest: detention, being a tight ass . . . spending time with my child (who looks like a gorilla)
- \*\*\* in my office, hitting on students and their parents
- Teachers reported students' discussions of the page
- Principal disciplined the student

• **PROTECTED SPEECH OR NOT?**

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## ONLINE IMPERSONATION – "CATFISHING"

CAL. PENAL CODE 528.5

- Misdemeanor to knowingly and without consent credibly impersonate another person through electronic means
- For purposes of:
  - harming,
  - intimidating,
  - threatening, or
  - defrauding the person.



Sentence of up to 1 year in jail and a maximum fine of \$1,000. Victims may pursue civil claims against the impersonator for monetary relief.

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## SAFEGUARDS FOR STUDENTS A.B. 1442 – JAN 2015

- Districts, county offices of education and charter schools must first notify students and parents that they are considering adopting a social media monitoring program and to allow for public comment.
- Monitoring and collection of information on social media by schools are restricted to only information that is directly relevant to school or pupil safety.
- Schools must allow students to see exactly what information has been collected on them from social media and to correct or remove any of that information and otherwise mandates that the information be destroyed when the student turns 18 years old or is no longer enrolled at the district.
- Districts must give notice of the program to parents and guardians.

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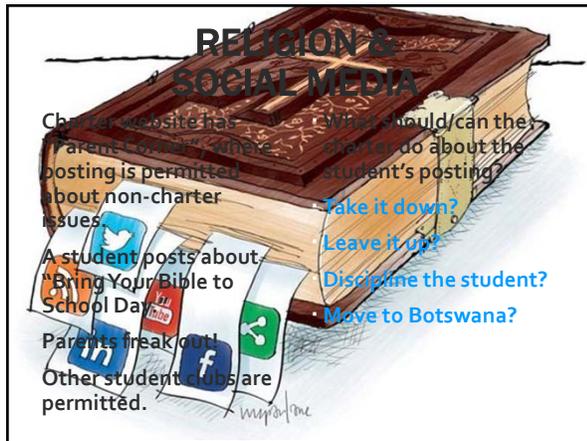
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## RECOMMENDATIONS FOR CHARTER-AFFILIATED SOCIAL MEDIA SITES

- Charter owns, operates, and manages the account
- Employees are required to set up Charter accounts with their school e-mail address
- Employees are required to provide IT with usernames and passwords to these accounts upon setup and each time this information is changed
- Use an application/request form to document this information and require the employee's acknowledgment of these terms and conditions
- MONITOR your Charter social media accounts

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## STAFF POLICY RECOMMENDATIONS

- Employees should not accept invitations to non-school related social networking sites from parents, students or alumni under the age of 18.
  - To prevent "catfishing" of unsuspecting employees
  - Even when employee does not know identity is false, could still result in termination when ability to effectively perform job is compromised. ("unfit")
- During emergencies, post only a general statement of well-being only it does not interfere with your normal work duties
- Employees should be advised that personal site content may impact their employment

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## STAFF RECOMMENDATIONS

- **Never** post any identifying student information without written informed consent of parent and the Principal
- **Never** post any identifying staff information without the informed consent of the staff member
- **Never** share confidential or privileged information about students or personnel
  - Grades, attendance records, or other pupil/personnel information
  - Non-public personal information

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## STAFF RECOMMENDATIONS

- No postings that include discriminatory remarks, harassment, retaliation and threats of violence or similar inappropriate or unlawful conduct.
- No postings about students, coworkers, or supervisors or the Charter that are false, defamatory, libelous, tortious, vulgar, obscene, or invasive of the privacy of others.

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## STAFF RECOMMENDATIONS

- No posting where employee represents that an opinion or statement is the policy or view of the Employer or on behalf of the Employer unless authorized by the School
- If you have work-related blog entries or other posts, include a disclaimer that the postings are "my own and do not necessarily reflect the view of the School."

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## QUESTIONS?

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Trisha Vais, Trivium Charter

- [tvais@triviumcharter.org](mailto:tvais@triviumcharter.org)

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## STUDENT SOCIAL MEDIA POLICIES

New York City Schools Student Guidelines for Social Media Use:

For students under 12: <http://schools.nyc.gov/NR/ronlyres/C5A1F024-5B97-4894-92FA-078F50FF06B8/0/SMG12andYounger.pdf>

For students 13 years and older: [http://schools.nyc.gov/NR/ronlyres/B7546E6E-8569-4426-A219-D8D113EF7733/0/SMG13andOlder\\_new.pdf](http://schools.nyc.gov/NR/ronlyres/B7546E6E-8569-4426-A219-D8D113EF7733/0/SMG13andOlder_new.pdf)

NYC Schools also offers a wide variety of other resources on social media use, including information for parents, infographics for teens, and activity books to educate younger children: <http://schools.nyc.gov/RulesPolicies/SocialMedia/default.htm>

Los Angeles Unified School District's Social Media Policy for Students:  
<http://achieve.lausd.net/Page/8619>

San Diego Unified School District Internet Use Policy:  
[https://www.sandiegounified.org/sites/default/files\\_link/district/files/procedures/pp4580.pdf](https://www.sandiegounified.org/sites/default/files_link/district/files/procedures/pp4580.pdf)

Crowdsourced Sample Social Media Policy for Schools:  
<http://dailygenius.com/editable-social-media-policy-for-schools/>

Orange County Department of Education: Student Use of Technology (sample student policy on page 16)  
<https://www.ocde.us/LegalServices/Documents/Students%20Use%20of%20Technology%20Workbook%203rd%20Edition%20FEBRUARY%202012.pdf>

## 1.1 Employee Social Media

### 1.1.1 Scope

In light of the explosive growth and popularity of social media technology in today's society, the School has developed the following policy to establish rules and guidelines regarding the appropriate use of social media by employees. This policy applies to situations when you: (1) make a post to a social media platform that is related to the School; (2) engage in social media activities during working hours; (3) use School equipment or resources while engaging in social media activities; (4) use your School e-mail address to make a post to a social media platform; (5) post in a manner that reveals your affiliation with the School; or (6) interact with School students or parents/guardians of School students (regarding School-related business) on the Internet and on social media sites.

For the purposes of this policy, the phrase "social media" refers to the use of a website or other electronic application to connect with other people, including, but not limited to, Facebook, Twitter, Pinterest, LinkedIn, YouTube, and MySpace, as well as related web-based media, such as blogs, wikis, and any other form of user-generated media or web-based discussion forums. Social media may be accessed through a variety of electronic devices, including computers, cell phones, smart phones, PDAs, tablets, and other similar devices.

This policy is intended to supplement, not replace, the School's other policies, rules, and standards of conduct. For example, School policies on confidentiality, use of School equipment, professionalism, employee references and background checks, workplace violence, unlawful harassment, and other rules of conduct are not affected by this policy.

You are required to comply with *all* School policies whenever your social media activities may involve or implicate the School in any way, including, but not limited to, the policies contained in this Handbook.

### 1.1.2 Standards of Conduct

You are required to comply with the following rules and guidelines when participating in social media activities that are governed by this policy:

- Comply with the law at all times. Do not post any information or engage in any social media activity that may violate applicable local, state, or federal laws or regulations.
- Do not engage in any discriminatory, harassing, or retaliatory behavior in violation of School policy.
- Respect copyright, fair use, and financial disclosure rules and regulations. Identify all copyrighted or borrowed material with proper citations and/or links.
- Maintain the confidentiality of the School's trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how, and technology. Do not post internal reports, policies,

procedures, or other internal business-related confidential communications. This prohibition applies both during and after your employment with the School.

- Do not post confidential information (as defined in this Handbook) about the School, its employees, or its students. Remember that most student information is protected by the Family Educational Rights and Privacy Act, including any and all information that might identify the student. Publicizing student work and accomplishments is permitted only if appropriate consents are obtained.
- While it is acceptable to engage in limited and incidental social media activities at work, such social media activities may not interfere with your job duties or responsibilities. [or] You may not engage in social media activities during working hours. [How restrictive do you want to be?] Do not use your School-authorized e-mail address to register on social media websites, blogs, or other online tools utilized for personal use.
- Be knowledgeable about and comply with the School's background check procedures. Do not "research" job candidates on the Internet or social media websites without prior approval from Human Resources.
- Be knowledgeable about and comply with the School's reference policy. Do not provide employment references for current or former employees, regardless of the substance of such comments, without prior approval from Human Resources.
- When posting about fellow employees, students, parents, vendors, customers, suppliers, or other people who work on behalf of the School, avoid posting statements, photographs, video, or audio that could be reasonably viewed as malicious, obscene, threatening, or intimidating, that disparage employees, students, parents, vendors, customers, suppliers, or other people who work on behalf of the School, or that might constitute harassment or bullying.
- Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Never post any information or rumors that you know to be false about the School, fellow employees, students, parents, vendors, customers, suppliers, people working on behalf of the School, or competitors.
- Express only your personal opinions. Never represent yourself as a spokesperson for the School unless authorized to do so. If you publish social media content that may be related to your work or subjects associated with the School, make it clear that you are not speaking on behalf of the School and that your views do not represent those of the School, fellow employees, students, parents, vendors, customers, suppliers, or other people working on behalf of the School. It is best to use a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of the School."
- Never be false or misleading with respect to your professional credentials.

### 1.1.3 Creating and Using School Social Media

Employees are only permitted to communicate and connect with students on social media that is owned and operated by the School. Employees are only permitted to communicate and connect with students' parents or guardians regarding School-related matters on social media that is owned and operated by the School. All communications with parents or guardians regarding School-related matters on non-School or personal social media may result in disciplinary action, up to and including termination. Any communication whatsoever with students on non-School or personal social media may result in disciplinary action, up to and including termination.

The IT Department, in addition to Human Resources and members of the administration, are responsible for approving requests for School social media, monitoring School social media for inappropriate and unprofessional content, and maintaining the social media account information (including, but not limited to, username and password). The School has final approval over all content and reserves the right to close the social media at any time, with or without notice. Any inappropriate or unprofessional communications may result in disciplinary action, up to and including termination.

To set up social media that is owned and operated by the School in compliance with this policy, employees must adhere to the following procedures:

- Request and obtain permission to create School social media from [supervisor? administrator? HR? principal?].
- Contact the IT Department to set up the social media. Provide the IT Department with the username and password that you would like assigned to the account. If you change the username and/or password, you must immediately update this information with the IT Department. Failure to do so may result in disciplinary action, up to and including termination.

Any social media created and/or used in violation of this policy may result in disciplinary action, up to and including termination.

#### 1.1.4 Access

Employees are reminded that the School's various electronic communications systems, including, but not limited to, its electronic devices, computers, telephones, e-mail accounts, video conferencing, voice mail, facsimiles, internal and external networks, computers, cell phones, smart phones, PDAs, tablets, and other similar devices, are the property of the School. All communications and information transmitted by, received from, or stored in these systems are School records.

As a result, the School may, and does, monitor its employees' use of these electronic communication systems, including for social media activities, from time to time. The School may monitor such activities randomly, periodically, and/or in situations when there is reason to believe that someone associated with the School has engaged in a violation of this, or any other, School policy. As a result, employees do not have a reasonable expectation of privacy in their use of or access to the School's various electronic communications systems.

#### 1.1.5 Discipline

Any violation of this Social Media Policy may result in disciplinary action, up to and including immediate termination.

#### **1.1.6 Retaliation Is Prohibited**

The School prohibits retaliation against any employee for reporting a possible violation of this policy or for cooperating in an investigation of a potential violation of this policy. Any employee who retaliates against another employee for reporting a possible violation of this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

#### **1.1.7 Questions**

In the event you have any questions about whether a particular social media activity may involve or implicate the School, or may violate this policy, please contact Human Resources.

Social media is in a state of constant evolution, and the School recognizes that there will likely be events or issues that are not addressed in these guidelines. Thus, each School employee is responsible for using good judgment and seeking guidance, clarification, or authorization *before* engaging in social media activities that may implicate this policy.